

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOSEPH R. KNIGHT,

Plaintiff,

vs.

UNITED STATES POSTAL SERVICE,
an agency, JOHN E. POTTER,
Postmaster General, and FRED
PARKER, an individual,

Defendants.

Civ. No. 06-1318-TC

FINDINGS AND RECOMMENDATION

Coffin, Magistrate Judge:

Before the court is defendants United States Postal Service's (USPS) and John E. Potter's motion to dismiss (#11). For the reasons that follow, the motion should be granted.

BACKGROUND

Plaintiff is employed as a mail-handler at a United States post office in Salem, Oregon. He alleges that he has been subjected to abuse by a co-worker and to harassment by his supervisor, Fred Parker, causing physical and emotional injury, and damages in the form of medical expenses and lost wages. Complaint at 5-7. He brings a number of claims against all or some of the three defendants in this action, the USPS, Postmaster General Potter, and Parker: (1) a "hostile work environment"

1 Findings and Recommendation

1 claim against USPS and Potter, for which no statutory basis is
2 provided; (2) assault, against Parker only; (3) battery, against
3 Parker only; (4) intentional infliction of emotional distress,
4 against USPS and Potter; and, (5) intentional infliction of
5 emotional distress, against Parker.

6 Defendants USPS and Potter move to dismiss only plaintiff's
7 hostile work environment and intentional infliction of emotional
8 distress claims. Fed. R. Civ. Proc. 12(b)(1), which requires
9 dismissal of a claim for lack of subject matter jurisdiction,
10 resolves this motion in defendants' favor.

11 12 ANALYSIS

13 Hostile Work Environment

14 Plaintiff asserts that his employer's failure to remediate
15 the alleged mistreatment that he suffered at the hands of a co-
16 worker resulted in a "hostile, offensive, and intimidating work
17 environment." Plaintiff has not alleged any statutory basis for
18 the claim in federal law. The court notes that plaintiff
19 asserted jurisdiction in this court by citing (among other
20 statutes) 28 U.S.C. § 1331, which confers jurisdiction to federal
21 courts for cases arising under federal law. If the court is to
22 assume that this claim is alleged to arise under federal law,
23 then the most appropriate statute that would authorize
24 plaintiff's claim is 42 U.S.C. § 2000e-16, which provides the
25 exclusive remedy for discrimination in federal employment. Brown
26 v. General Services Admin., 425 U.S. 820, 829-36 (1976).

27 As defendants correctly explain, exhaustion of
28 administrative remedies is required before calling upon a federal

2 Findings and Recommendation

1 court to hear a civil claim under the statute. 42 U.S.C. §
2 2000e-16(c).¹ The relevant regulations require the plaintiff to
3 contact an EEOC counselor, file a formal complaint, and await a
4 final decision by the agency on the complaint. 29 C.F.R. §§
5 1614.105-1614.106; 42 U.S.C. § 2000e-16(c).

6 Plaintiff has not alleged compliance with those
7 requirements. Moving defendants have filed a declaration of the
8 Equal Employment Opportunity Specialist for USPS, who declares
9 that her search has revealed no record of any EEO complaint filed
10 by plaintiff. Perry Declaration at 2. Plaintiff has not filed
11 a response to the motion and does not allege that any exception
12 to the exhaustion requirement, if available, should apply. Under
13 these circumstances, dismissal is appropriate.

14 15 Intentional Infliction of Emotional Distress

16 Plaintiff further asserts that his employer's failure to

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18 ¹ 42 U.S.C. § 2000e-16(c) states:

19 Within 90 days of receipt of notice of final action
20 taken by a department, agency, or unit referred to in
21 subsection (a) of this section, or by the Equal Employment
22 Opportunity Commission upon an appeal from a decision or
23 order of such department, agency, or unit on a complaint
24 of discrimination based on race, color, religion, sex or
25 national origin, brought pursuant to subsection (a) of this
26 section, Executive Order 11478 or any succeeding Executive
27 orders, or after one hundred and eighty days from the
28 filing of the initial charge with the department, agency,
or unit or with the Equal Employment Opportunity Commission
on appeal from a decision or order of such department,
agency, or unit until such time as final action may be
taken by a department, agency, or unit, an employee or
applicant for employment, if aggrieved by the final
disposition of his complaint, or by the failure to take
final action on his complaint, may file a civil action as
provided in section 2000e-5 of this title, in which civil
action the head of the department, agency, or unit, as
appropriate, shall be the defendant.

3 Findings and Recommendation

1 protect plaintiff from mistreatment constitutes intentional
2 infliction of emotional distress. Again, plaintiff does not
3 assert a statutory basis for this court's exercise of
4 jurisdiction to adjudicate the claim. The court assumes, as do
5 defendants, that the most appropriate option for plaintiff would
6 be the Federal Tort Claim Act (FTCA), 28 U.S.C. § 2671, which
7 provides plaintiff the exclusive remedy for claims involving
8 injury resulting from negligence or wrongful acts of a federal
9 government employee acting in the scope of duty. 28 U.S.C. §
10 2679(b)(1).

11 Assuming this is the type of claim that plaintiff is
12 attempting to state, he has not brought it against the proper
13 defendant.² The "United States is the only proper party defendant
14 in an FTCA action . . . The FTCA is the exclusive remedy for tort
15 actions against a federal agency, and this is so despite the
16 statutory authority of any agency to sue or be sued in its own
17 name." Kennedy v. United States Postal Service, 145 F.3d 1077,
18 1078 (9th Cir. 1998) (citing 28 U.S.C. § 2679(a)). "A claim
19 against the United States Postal Service in its own name is not
20 a claim against the United States," and therefore such a case is
21 properly dismissed as brought against an improper party. Id.

22 Even if the FTCA were alleged as the statutory basis for
23 plaintiff's IIED claim, and even if it applied in plaintiff's
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26 ²In the alternative, if plaintiff instead attempts to allege an
27 employment related tort under the Civil Service Reform Act (CSRA), 5
28 U.S.C. §§ 7501-43 (1998), which governs adverse employment actions
against Postal Service employees, see 39 U.S.C. § 1005(a)(1), his claim
would still fail. The CSRA governs disciplinary personnel actions such
as termination or suspension, see 5 U.S.C. §§ 7512, 7532, and no such
action is alleged here.

1 case,³ plaintiff has not met his burden of demonstrating that he
2 exhausted administrative remedies, a jurisdictional prerequisite
3 to bringing the claim before this court. Cadwater v. United
4 States, 45 F.3d 297, 300 (9th Cir. 1995). Plaintiff alleges
5 that, in October 2005, he notified "an agency of his claims."
6 Complaint at 7. However, defendants have filed a declaration
7 that calls that assertion into doubt. According to the official
8 charged with handling all tort claims against USPS within the
9 district, no such FTCA notice from plaintiff was received, even
10 despite procedures for forwarding misdirected notices. Gorsky
11 Declaration at 1-2.

12 Plaintiff bears the burden of showing that administrative
13 remedies have been exhausted. See, e.g., Kielwien v. United
14 States, 540 F.2d 676, 679 n.6 (4th Cir.), cert. denied, 429 U.S.
15 979 (1976) (obligation to prove prior administrative claim rests
16 on plaintiff). Plaintiff has not put forth any evidence to
17 counter this declaration or argument in a reply brief.

18 Plaintiff did allege, however, that he received no response
19 to his claim notice and therefore filed after waiting six months.
20 Complaint, 7. Plaintiff apparently did so pursuant to 28 U.S.C.
21 § 2675, which states, "The failure of an agency to make final
22 disposition of a claim within six months after it is filed shall,
23 at the option of the claimant any time thereafter, be deemed a
24 final denial of the claim for purposes of this section."
25 (Emphasis added.) That provision cannot save plaintiff's claim.


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27 ³ There is some doubt as to whether the conduct that is alleged
28 to have precipitated the IIED claim, plaintiff's assault and battery
at the hands of his co-worker, falls within the scope of the FTCA's
waiver of immunity. 28 U.S.C. § 2680(h) states that the FTCA does not
apply to "[a]ny claim arising out of assault [or] battery."

1 The six-month waiting period is triggered by proper filing of a
2 claim. Plaintiff has not adduced any evidence of filing. For
3 that reason, he has not met his burden to demonstrate exhaustion
4 of administrative remedies, and the claim is not properly before
5 the court. The claim should be dismissed for lack of subject
6 matter jurisdiction.

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8 CONCLUSION

9 For the foregoing reasons, defendants' motion to dismiss
10 (#11) should be granted.

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14 Dated this 23 day of August, 2007.

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19 THOMAS M. COFFIN
20 United States Magistrate Judge
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